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16 UNITED STATES DISTRICT COURT
17 EASTERN DISTRICT OF CALIFORNIA
18

19 National Association of Wheat
20 Growers, et al.,

21 Plaintiffs,

22 v.

23 Lauren Zeise, et al.,

24 Defendants.
25
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27
28

No. 2:17-cv-02401-WBS-EFB

**BRIEF FOR 11 STATES AS AMICI
CURIAE IN SUPPORT OF
PLAINTIFFS'S MOTION FOR
PRELIMINARY INJUNCTION**

Hearing: Feb. 20, 2018

Time: 1:30 p.m.

Ctrm: 5

The Honorable William B. Shubb

Case Filed: Nov. 15, 2017

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INTEREST OF AMICI

1
2 *Amici curiae* include the States of Missouri, Idaho, Indiana,
3 Iowa, Louisiana, Kansas, Michigan, North Dakota, Oklahoma, South
4 Dakota, and Wisconsin. *Amici* States are home to tens of thousands
5 of workers and businesses adversely affected by California's
6 speech mandate regarding glyphosate products. Plaintiffs present
7 the First Amendment harms caused by the regulation. These First
8 Amendment harms are heightened by the fact that the speech
9 mandate intrudes on the equal right of sovereign States to craft
10 their own public policy and inflicts significant damage on the
11 people and economies of other States. The States have a strong
12 interest in safeguarding the structural separation of powers, not
13 only between state governments and the federal government, but
14 also among the governments of the several States. Each State is
15 charged in its sovereign capacity with protecting economic
16 freedom, stimulating growth, and maintaining laws that protect
17 consumers from misleading or false statements. California's
18 mandate impedes these duties.

19 *Amici* States have a substantial interest in this case
20 because California's speech mandate for glyphosate products is
21 fundamentally at odds with the consumer-protection policies of
22 other States. Most States have adopted legal provisions that
23 prohibit businesses from branding their products with false or
24 misleading statements. Yet California's regulation *compels*
25 businesses to issue false and misleading statements about their
26 own products. The regulation therefore imposes confusing and
27 contradictory obligations on businesses and interferes with the
28 ability of other sovereign States to craft rational and

1 consistent consumer-protection policies. By interfering with that
2 ability, the California regulation encroaches on the equal
3 sovereignty afforded to all States and risks creating "zones" of
4 commerce antithetical to a national economy. Because *Amici* States
5 have an interest in protecting their sovereignty, promoting
6 rational consumer-protection policies, preventing needless price
7 shocks in the market for basic food staples, and fostering
8 economic growth in their own States, they have an interest in the
9 outcome of this case.

10 **INTRODUCTION**

11 Glyphosate is not "known to the State of California to cause
12 cancer." California's own studies have never determined as much,
13 nor has any other study established that glyphosate causes
14 cancer. In a widely criticized study, the France-based
15 International Agency for Research on Cancer (IARC) identified a
16 possible link. That study is an outlier, and it did not even
17 determine that a link existed between glyphosate and cancer in
18 humans. Instead of classifying glyphosate as a "Group 1"
19 substance (its designation for substances known to cause cancer),
20 it classified glyphosate as a "Group 2A" substance that is
21 "probably" carcinogenic. That category denotes substances for
22 which some evidence exists of a causal link to cancer but for
23 which no causal link could be identified "with reasonable
24 confidence." Even though no study has identified a definite link
25 between glyphosate and cancer, the regulation at issue here
26 requires businesses that sell products containing glyphosate to
27 declare that glyphosate is "known" to cause cancer.

28 That requirement imposes substantial economic harm on

1 businesses outside California and places non-California
2 businesses in an untenable position. *Amici* States have robust
3 consumer-protection laws. Although the details vary among the
4 States, the laws generally prohibit attaching misleading or false
5 information to products sold by residents of those States. But
6 California's speech mandate for glyphosate requires the opposite.
7 It directs nonresident businesses to affirm that their products
8 are "known" to cause cancer even though that statement is
9 misleading at best. The mandate therefore presents conscientious
10 business owners with a no-win proposition, and it interferes with
11 the ability of other States to craft rational and consistent
12 consumer-protection policies. The mandate also undermines the
13 efficacy of other States' mandatory disclosures by contributing
14 to the well-documented phenomenon of "disclosure fatigue."

15 Because California's mandate interferes with other States'
16 sovereign interests, the public interest favors granting a
17 preliminary injunction in this case. Sovereign States have the
18 right and power to pass reasonable consumer-protection laws to
19 safeguard their citizens and keep their businesses accountable.
20 The mandate interferes with that right by imposing confusing and
21 conflicting obligations on non-resident businesses. Compliance
22 with California's regulation thus undermines the sensible
23 consumer-protection laws of other States. This Court should give
24 due weight to the sovereign interests of other States and
25 California's injury to federalism when assessing where the public
26 interest lies.

27 **ARGUMENT**

28 This Court should declare Proposition 65 unlawful with

1 respect to products containing glyphosate and enjoin the
2 enforcement or threat of enforcement of its compelled-speech
3 mandate. The mandate undermines consumer-protection laws passed
4 by other States because it requires nonresident businesses to
5 label products with false, misleading information, contrary to
6 the consumer-protection policies of other States. The requirement
7 encroaches on the equal sovereignty of other States and threatens
8 to inflate food prices for all Americans, especially the
9 neediest, without any plausible justification.

10 **I. California's Speech Mandate Undermines the Sensible**
11 **Consumer-Protection Laws and Policies of Other States.**

12 As Plaintiffs point out, California's speech mandate offends
13 the First Amendment by mandating that businesses "defame their
14 own products." Pl. Mem. 1. Under the Supreme Court's case law,
15 compelled commercial speech that is "purely factual and
16 uncontroversial" does not offend First Amendment values.
17 *Zauderer v. Office of Disciplinary Counsel of Supreme Court of*
18 *Ohio*, 471 U.S. 626, 651 (1985). California's speech mandate for
19 glyphosate products requires the exact opposite - it mandates
20 affirmatively false and misleading statements.

21 The First Amendment injuries identified by Plaintiffs are
22 heightened because they adversely impact the sovereign interests
23 of other States in at least two ways. First, by *requiring* false
24 or misleading statements about glyphosate products, California's
25 speech mandate imposes confusing and potentially inconsistent
26 obligations on nonresident businesses that are bound by other
27 States' consumer-protection laws *not* to make false and misleading
28 statements about their own products. Second, the speech mandate

1 impairs consumer-protection efforts of the States that require
2 sensible health-and-safety disclosures by contributing to the
3 well-known phenomenon of disclosure fatigue.

4 **A. Because the regulation requires businesses to make**
5 **false statements, it imposes confusing and**
6 **potentially inconsistent obligations on businesses**
7 **bound by other States' consumer-protection laws.**

8 Although the precise details of consumer-protection laws
9 vary from State to State, those laws generally prohibit making
10 false or misleading statements in connection with commercial
11 transactions. Missouri law, for example, imposes broad liability
12 for engaging in "deception" or making any "misrepresentation" or
13 "omission of any material fact." Mo. Rev. Stat. § 407.020. That
14 prohibition applies to any "statement made by a seller in any
15 manner in the course of the solicitation of business," including
16 by affixing a "label" to a product, if the statement "has the
17 capacity to mislead." Mo. Code Regs. Ann. tit. 15, §§ 60-
18 7.010(1)(A), 60-7.020.

19 Provisions like these prohibit misleading statements, but
20 the California regulation mandates them. That regulation requires
21 businesses that sell products containing glyphosate in California
22 to state that glyphosate is "known" to California to cause
23 cancer, misleading reasonable consumers to believe that a
24 definite causal link has been found between glyphosate and cancer
25 in humans. Yet California possesses no such knowledge. Its own
26 studies have found the opposite. And the sole study that found a
27 *possible* link - the IARC study - expressly declined to state that
28 a definite causal link existed. IARC classifies substances as

1 "Group 1" substances "when there is sufficient evidence of
2 carcinogenicity in humans," denoting that "a causal relationship
3 has been established." World Health Org., *IARC Monographs on the*
4 *Evaluation of Carcinogenic Risks to Humans* 19, 22 (2006)
5 (emphasis omitted). But the same organization classifies
6 substances in "Group 2A" when "there is limited" or "inadequate
7 evidence of carcinogenicity" – meaning that some evidence
8 supports an inference but that no causal link can be identified
9 "with reasonable confidence." *Id.* at 19-20, 22. California's
10 compelled disclosure is thus simply incorrect, as a matter of
11 fact. Because the regulation affirmatively requires businesses to
12 issue misleading statements, it imposes confusing and potentially
13 inconsistent obligations on non-resident businesses governed by
14 the consumer-protection laws of their home States.

15 The limitation of the regulation to products sold in
16 California does not mitigate this problem. Most States' consumer-
17 protection laws prohibit making false or misleading statements to
18 nonresidents as well as residents. *See, e.g.,* Mo. Rev. Stat.
19 § 407.025.1. The consumer-protection laws of Missouri, for
20 example, apply to commerce "in or from the state of Missouri,"
21 *id.* § 407.020.1 (emphasis added), so products sold *outside*
22 Missouri are covered so long as some "chain" of transactions
23 leads back there. *State ex rel. Nixon v. Estes*, 108 S.W.3d 795,
24 801 (Mo. Ct. App. 2003); *see also State ex rel. McKeage v.*
25 *Cordonnier*, 357 S.W.3d 597, 601 (Mo. 2012); *Sloan-Roberts v.*
26 *Morse Chevrolet, Inc.*, 44 S.W.3d 402, 407 (Mo. Ct. App. 2001).

27 Conscientious businesses take great pains to avoid violating
28 such consumer-protection laws, and for good reason. Many

1 consumer-protection laws impose strict liability, *e.g.*, *Plubell*
2 *v. Merck & Co.*, 289 S.W.3d 707, 713 (Mo. Ct. App. 2009), and the
3 majority of States also permit private actions to enforce them,
4 *see, e.g.*, *Cordonnier*, 357 S.W.3d at 601; *see also, e.g.*, Conn.
5 Gen. Stat. § 42-110g(b); Idaho Code § 48-608(1); Kan. Stat. § 50-
6 634(c), (d); Tex. Bus. & Com. Code § 17.501; Wyo. Stat. Ann.
7 § 40-12-108(b); *Arthur v. Microsoft Corp.*, 676 N.W.2d 29 (Neb.
8 2004). Most such statutes also provide for significant fines per
9 violation. *E.g.*, Ariz. Rev. Stat. § 44-1531(A); Ark. Code § 4-88-
10 113(a)(3); Del. Code Ann. tit. 6, § 2522(b); Fla. Stat. Ann.
11 § 501.2075; Haw. Rev. Stat. § 480-3.1; Kan. Stat. § 50-636; Me.
12 Rev. Stat. Ann. tit. 5 § 209; Miss. Code § 75-24-19(1)(b); Mont.
13 Code § 30-14-142(2); N.J. Stat. Ann. § 56:8-13; Okla. Stat. Ann.
14 tit. 15, § 761.1(C); Vt. Stat. Ann. tit. 9, § 2458(b)(1); Wis.
15 Stat. Ann. § 100.26(5). Other States impose even higher
16 penalties. *E.g.*, 815 Ill. Comp. Stat. Ann. § 505/7(b); Iowa Code
17 § 714.16.7; Minn. Stat. § 8.31(3); Tex. Bus. & Com. Code
18 § 17.47(c). Businesses, therefore, have powerful incentives to
19 comply with local consumer-protection statutes.

20 The confusing and potentially inconsistent legal obligations
21 imposed by California's mandate give businesses a powerful
22 incentive to abandon glyphosate products altogether. For
23 logistical reasons, businesses often cannot predict the final
24 destination of a product at the time of packaging. Frequently, it
25 is not feasible to separate products destined for sale in
26 California from products to be sold in other States. Those
27 businesses either must include the disclosure on all relevant
28 products – regardless of where those products will end up – or

1 forego sale of glyphosate products altogether.

2 California's mandate thus imposes a dilemma on businesses
3 involved in the distribution of glyphosate products. Faced with
4 this dilemma, many businesses will conclude one of two things:
5 they must either cease engaging in transactions that involve
6 glyphosate, or they must withdraw from participation in any
7 distribution chain that ends in California. The mandate thus
8 frustrates the purpose of state consumer-protection statutes,
9 which are designed to facilitate honest commerce, not to cause
10 businesses to forgo economic opportunities.

11 "Generally speaking," the Constitution "protects against
12 inconsistent legislation arising from the projection of one state
13 regulatory regime into the jurisdiction of another State." *Healy*
14 *v. Beer Institute, Inc.*, 491 U.S. 324, 336-37 (1989); accord *CTS*
15 *Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (stating
16 that the Constitution protects against the "risk of inconsistent
17 regulation by different States"). California's speech mandate
18 violates this constitutional prohibition by imposing
19 "inconsistent regulation" on non-resident businesses. *Id.* The
20 First Amendment injuries are heightened when compliance with
21 California's compelled-speech regime conflicts with efforts to
22 comply with other States' more reasonable consumer-protection
23 statutes.

24 **B. California's speech mandate dilutes the efficacy of**
25 **disclosure requirements of other States.**

26 Proposition 65, routinely criticized for its overbreadth, is
27 the quintessential example of a regulation that causes disclosure
28 fatigue. Although the regulation initially included only 29

1 substances, *Consumer Def. Grp. v. Rental Hous. Indus. Members*, 40
2 Cal. Rptr. 3d 832, 852 (Cal. Ct. App. 2006), that number has
3 ballooned to almost one thousand. See Cal. Code Regs. tit. 27,
4 § 27001. Proposition 65 thus requires businesses to barrage
5 consumers with countless disclosures. Studies have affirmed what
6 common sense dictates: the more ubiquitous disclosures become,
7 the less effective they are. See, e.g., Omri Ben-Shahar & Carl E.
8 Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev.
9 647, 689-90 (2011) ("One disclosure by itself may seem trivial,
10 but en masse disclosures are overwhelming."). The federal
11 government has expressly declined to require certain disclosures
12 on food labels for this very reason: "[A]n overabundance of
13 warning statements may desensitize the general public to safety
14 concerns and subsequently cause warning statements to lose some
15 of their value." 58 Fed. Reg. 2850, 2872 (1993).

16 Because many businesses cannot readily separate California-
17 bound products from other products, the mandate encourages those
18 businesses that do not withdraw entirely from California markets
19 to place the required disclosure on all merchandise, regardless
20 of the ultimate destination. That torrent of additional
21 disclosures in States outside California decreases the efficacy
22 of disclosures already required by those States. When disclosures
23 become the rule, not the exception, consumers tend to ignore
24 them. An otherwise useful tool becomes transformed into nothing
25 more than irritating ambient noise. By providing a strong
26 incentive to print misleading, unnecessary disclosures on
27 products sold in other States, California's regulation dilutes
28 the effectiveness of other States' mandated disclosures and

1 undermines consumer-protection efforts in those States.

2 **II. Because California's Speech Mandate Intrudes on the**
3 **Sovereign Interests of Other States, the Public**
4 **Interest Favors Entry of a Preliminary Injunction.**

5 Because California's speech mandate infringes on the
6 sovereign interests of other States, the public interest favors
7 the entry of a preliminary injunction. *Winter v. NRDC, Inc.*, 555
8 U.S. 7, 20 (2008). Typically, when a State is the defendant in an
9 action seeking a preliminary injunction, there is a strong
10 presumption that the State's enforcement of its duly enacted laws
11 reflects the public interest. *See, e.g., Nken v. Holder*, 556 U.S.
12 418, 435 (2009) ("[A]ssessing the harm to the opposing party and
13 weighing the public interest . . . merge when the Government is
14 the opposing party."); *Maryland v. King*, 567 U.S. 1301, 1303
15 (2012) (Roberts, C.J., in chambers) ("Any time a State is
16 enjoined by a court from effectuating statutes enacted by
17 representatives of its people, it suffers a form of irreparable
18 injury." (brackets omitted)); *New Motor Vehicle Bd. of Cal. v.*
19 *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in
20 chambers) (same). But this calculus changes when one State's
21 regulation interferes directly with the sovereign interests of
22 other States.

23 Here, the Court should weigh heavily the fact that
24 California's mandate interferes with federalism and the sovereign
25 interests of other States when assessing the public interest
26 factor. The Court's assessment of the First Amendment injuries
27 and public harm from California's speech mandate should take into
28 account its intrusion on other States' valid interests and its

1 erection of a formidable trade barrier among the States.

2 Proper respect for federalism is integral to our
3 constitutional system. The Framers of the Constitution were
4 keenly aware of the tendency of the original thirteen States to
5 pursue parochial interests, and they deliberately framed the
6 Constitution to avoid such parochial competition and strife.
7 Under the Articles of Confederation, "each State was free to
8 adopt measures fostering its own local interests without regard
9 to possible prejudice to nonresidents." *Camps Newfound/Owatonna,*
10 *Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997). This
11 "conflict of commercial regulations, destructive to the harmony
12 of the States . . . was the immediate cause that led to the
13 forming of a constitutional convention." *Id.* (brackets omitted)
14 (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 224 (1824) (Johnson, J.,
15 concurring)). That Constitution was founded on a "political
16 philosophy less parochial in range." *Baldwin v. G.A.F. Seelig,*
17 *Inc.*, 294 U.S. 511, 523 (1935).

18 Indeed, one "central concern" of the new Constitution was to
19 prevent the friction between States arising from interstate trade
20 barriers that plagued the Articles of Confederation. *Hughes v.*
21 *Oklahoma*, 441 U.S. 322, 325-26 (1979). The Constitution
22 "reflect[s] a central concern of the Framers that was an
23 immediate reason for calling the Constitutional Convention: the
24 conviction that in order to succeed, the new Union would have to
25 avoid the tendencies toward economic Balkanization that had
26 plagued relations among the Colonies and later among the States
27 under the Articles of Confederation." *Id.* James Madison commented
28 that, if the individual States "[w]ere . . . at liberty to

1 regulate the trade between State and State," interstate trade
2 barriers "would nourish unceasing animosities, and not improbably
3 terminate in serious interruptions of the public tranquillity."
4 THE FEDERALIST No. 42 (Madison), at 214.

5 The impact of unjustifiable trade barriers among the States
6 is particularly offensive to principles of federalism. As the
7 Supreme Court has stated, "[t]rade barriers may cause a blight no
8 less serious than the spread of noxious gas over the land or the
9 deposit of sewage in the streams. They may affect the prosperity
10 and welfare of a State as profoundly as any diversion of waters
11 from the rivers." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex*
12 *rel., Barez*, 458 U.S. 592, 606 (1982) (square brackets omitted)
13 (quoting *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450-51
14 (1945)). Where the "economy of [another State] and the welfare
15 of her citizens have seriously suffered as the result" of an
16 interstate trade barrier, each State has a core sovereign
17 interest in seeking relief against "a wrong, which if proven,
18 limits the opportunities of her people, shackles her industries,
19 retards her development, and relegates her to an inferior
20 economic position among her sister States." *Pennsylvania R. Co.*,
21 324 U.S. at 450-51.

22 Here, California's speech mandate creates trade barriers
23 that intrude on the valid interests of other States. As
24 discussed, the mandate imposes confusing and potentially
25 inconsistent obligations on non-resident businesses, creating a
26 strong incentive to abandon glyphosate markets altogether. For
27 that reason, it also distorts purchasing decisions made by
28 businesses outside California. Manufacturers are likely to

1 decline purchasing products from suppliers if those products
2 contain glyphosate. But that refusal is apt to have significant
3 financial consequences. Businesses around the country have
4 invested hundreds of millions of dollars into infrastructure for
5 glyphosate. Eliminating products that include glyphosate from the
6 market would eliminate much, if not all, of the value of those
7 investments.

8 Additionally, the refusal to purchase products containing
9 glyphosate could induce a price shock in food markets. Herbicides
10 have substantially increased crop yield since their introduction,
11 causing production costs to plummet and savings to consumers to
12 mount. As of 2004, corn yields had more than tripled since the
13 introduction of herbicides. Jorge Fernandez-Cornejo, *The Seed*
14 *Industry in U.S. Agriculture*, U.S. Dep't of Agric. 1 fig. 1 (Jan.
15 2004). Decreasing glyphosate use could therefore reverse much of
16 that yield increase, especially because glyphosate is by far the
17 most widely used herbicide for certain crops. "The percentage of
18 acres treated with glyphosate rose from 1 to 77% for corn from
19 1996 to 2014, from 13 to 99% for cotton from 1996 to 2010, and
20 from 25 to 98% for soybean from 1996 to 2012." Michael
21 Livingston, et al., *Economic Returns to Herbicide Resistance*
22 *Management in the Short and Long Run: The Role of Neighbor*
23 *Effects*, 64 *Weed Sci.* 595, 595-96 (2016). Needless to say, such
24 price jolts in the market for critical food staples will hit low-
25 income Americans the hardest, including the poorest citizens of
26 the *Amici* States.

27 California's speech mandate thus "implicates serious and
28 important concerns of federalism." *Wyoming v. Oklahoma*, 502 U.S.

1 437, 451 (1992) (citation omitted). Such federalism concerns go
2 beyond "concerns about fairness for the individual defendant,"
3 because they encompass "structural concerns about the effects of
4 state regulation on the national economy." *Quill Corp. v. N.*
5 *Dakota By & Through Heitkamp*, 504 U.S. 298, 312 (1992).

6 California's regulation impedes the ability of other States
7 to establish rational consumer-protection policies. The vast
8 majority of states reasonably prohibit businesses from branding
9 their products with false or misleading statements. California,
10 on the other hand, requires businesses to do the opposite. That
11 regulation has two predominant effects: 1) exposing nonresident
12 businesses to "inconsistent legislation arising from the
13 projection of one state regulatory regime into the jurisdiction
14 of another State," *Healy*, 491 U.S. at 336-37; and 2) effectively
15 blocking transactions of products that include glyphosate. By
16 creating a regulation with such a broad adverse economic reach,
17 California has twisted the effect of the consumer-protection laws
18 of other states. The regulation depriving those states of their
19 powers to promote the general welfare of their citizens and
20 therefore encroaches on their sovereignty.

21 **CONCLUSION**

22 For these reasons, *Amici* States request that this Court
23 grant the Plaintiffs' motion for a temporary restraining order
24 and preliminary injunction.

1 DATED: January 2, 2018

2 Respectfully submitted,

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